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ARTICLE 45—EVIDENCE

CPLR 4519: Dead Man's Statute not applicable when an interested claimant enters decedent's deposition into evidence.

New York's "Dead Man's Statute," contained in CPLR 4519, is designed to protect a decedent's interests from perjured testimony by rendering an interested witness incompetent to give testimony in his own behalf concerning a personal transaction with a deceased party.⁷⁰ The statute's prohibition against use of such interested testimony, however, is not absolute. Under its terms, when prior testimony of the decedent concerning the transaction with the interested witness has been submitted into evidence, CPLR 4519 is inapplicable.⁷¹ Although this statutory exception has been thought to embody a waiver concept,⁷² limiting the exception to the situation where the

⁷⁰ CPLR 4519 reads in pertinent part:

Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic

This statute, applicable only in civil proceedings, traditionally has operated against a party or person who at the time the testimony is to be submitted is interested in the event, *i.e.*, a person who "will either gain or lose by the direct legal . . . effect of the judgment," *Hobart v. Hobart*, 62 N.Y. 80, 83 (1875), *quoting* 1 S. GREENLEAF, EVIDENCE § 390 (2d ed. 1844); *see Croker v. New York Trust Co.*, 245 N.Y. 17, 156 N.E. 81 (1927); *In re Smith*, 153 N.Y. 124, 47 N.E. 33 (1897) (*per curiam*); *Scheu v. Blum*, 136 App. Div. 592, 121 N.Y.S. 122 (1st Dep't 1910), as well as against those "from, through or under" whom such a person has derived his interest. *See Duncan v. Clarke*, 308 N.Y. 282, 125 N.E.2d 569 (1955); *Rosseau v. Rouss*, 180 N.Y. 116, 72 N.E. 916 (1904). Under the rule, incompetent parties may not testify in their own behalf as to their "transactions or communications" with the deceased party. The terms "transactions or communications" have been broadly defined by the Court of Appeals to "embrace every variety of affairs," with the deceased party. *Holcomb v. Holcomb*, 95 N.Y. 316, 325 (1884). For comprehensive treatment of New York's Dead Man's Statute *see* W. RICHARDSON, EVIDENCE §§ 395-405 (10th ed. J. Prince 1973) [hereinafter cited as RICHARDSON]; 5 WK&M ¶¶ 4519.01-23.

⁷¹ CPLR 4519 permits the interested witness to testify when "the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication."

⁷² *See Miller v. Adkins*, 9 Hun 9 (N.Y. Sup. Ct. Gen. T. 3d Dep't 1876); 5 WK&M ¶ 4519.23. The courts traditionally have recognized the Dead Man's Statute to be waived in four situations: when the decedent's representative has testified in his own behalf as to a transaction between the decedent and the interested witness, *e.g.*, *Cole v. Sweet*, 187 N.Y. 488, 80 N.E. 355 (1907); when the decedent's representative has either cross-examined or called the incompetent witness to testify to the transaction, *e.g.*, *In re Estate of Anna*, 248

decendent's representative enters the prior testimony into evidence, the language of CPLR 4519 contains no such express limitation.⁷³ Thus, it has been unclear whether the exception is confined to the situation where the party protected by the Dead Man's Statute has waived his protection. Recently, in *Ward v. Kovacs*,⁷⁴ the Appellate Division, Second Department, rejecting the waiver theory, held that the statutory exception embraces a situation in which the decedent's prior testimony is introduced into evidence by the interested party.⁷⁵

The *Ward* plaintiff had instituted a medical malpractice action for damages resulting from the disablement of her right hand allegedly caused by the decedent-doctor. She alleged three separate occasions on which the decedent had departed from "generally accepted medical practice and standards."⁷⁶ In a sworn deposition taken at a pretrial examination, the doctor gave testimony which contradicted all three assertions.⁷⁷ At trial, which was commenced subsequent to the doctor's death, plaintiff introduced the decedent's deposition as part of her direct case.⁷⁸ The trial court then

N.Y. 421, 162 N.E. 473 (1928); when the decedent's representative has failed to object to improper testimony given by the interested witness, e.g., *In re Remlinger*, 258 App. Div. 911, 16 N.Y.S.2d 367 (2d Dep't 1939) (mem.); or, when prior testimony of the decedent concerning the transaction with the interested witness has been submitted into evidence, e.g., *Brown, Harris, Stevens, Inc. v. Bauer*, 103 N.Y.S.2d 10 (Sup. Ct. N.Y. County 1951).

Generally, the concept of waiver has not been favored by the courts, who have hesitated to "open the door" to testimony excluded by CPLR 4519. 5 WK&M ¶ 4519.23; see RICHARDSON, *supra* note 70, § 403. For instance, while waiver as to one transaction by the protected party permits the otherwise incompetent witness to testify concerning that same transaction, the latter's testimony may not extend to another independent transaction with the deceased. *Martin v. Hillen*, 142 N.Y. 140, 36 N.E. 803 (1894).

⁷³ See CPLR 4519, quoted in note 70 *supra*.

⁷⁴ 55 App. Div. 2d 391, 390 N.Y.S.2d 931 (2d Dep't 1977).

⁷⁵ *Id.* at 403-04, 390 N.Y.S.2d at 939-40.

⁷⁶ *Id.* at 393, 390 N.Y.S.2d at 933. Plaintiff originally had visited the decedent for treatment of what was believed to be a slight cut on her finger. She contended that on the first visit the doctor had improperly failed to inject her with penicillin, that when her condition worsened the next day, the doctor had improperly prescribed treatment over the telephone rather than having personally examined her, and that on the third day, after several calls for assistance, the doctor had failed to respond with the due diligence necessary under the circumstances. *Id.* at 392-93, 390 N.Y.S.2d at 932-33. The plaintiff eventually lost one whole finger, parts of three others, and effective use of her hand. *Id.*

⁷⁷ In response to plaintiff's allegations, see note 76 *supra*, the doctor testified, *inter alia*, that he had injected plaintiff with penicillin on her first visit. *Id.* He also denied recollection of the phone conversation with plaintiff and averred that had he conversed with her he would have insisted that she come to his office. *Id.*

⁷⁸ *Id.* CPLR 3117(a)(3)(i) permits "the deposition of any person [to] be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under [the applicable] rules, provided the court finds" that the deponent has died. See also *Fleury v. Edwards*, 14 N.Y.2d 334, 338-39, 200 N.E.2d 550, 552-53, 251 N.Y.S.2d 647, 650-51 (1964).

permitted plaintiff to testify in her own behalf as to her transactions with the decedent.⁷⁹ Judgment was rendered in favor of plaintiff, and defendant-executrix appealed.

The second department, reading 4519 literally, ruled that by introducing into evidence the decedent's prior testimony regarding a personal transaction with the interested party, that party rendered himself competent to testify concerning the transaction.⁸⁰ In reaching this decision the court noted that, contrary to the typical Dead Man's Statute case in which the deceased's "lips . . . [are] sealed in death," the decedent in *Ward* had been given an opportunity to express his account of the transaction."⁸¹ This consideration, coupled with the fact that the interested party was subjected to intensive jury scrutiny, the *Ward* court reasoned, ensured that the decedent's interests had been compromised no more than if the defendant, rather than the plaintiff, had introduced the deposition.⁸² Moreover, the court pointed out that a strict waiver concept, which permits the decedent's counsel to determine when to allow a surviving party to testify, may impede the truth-seeking function of the judiciary. Such a capacity to "open" or "close the door" to testimony, the *Ward* court stated, would influence counsel to make his decisions "as an advocate, and not as a disinterested 'officer of the court.'"⁸³

⁷⁹ The parties stipulated at trial that plaintiff could testify to any transaction or communication with the decedent, and that defendant would be granted a continuance objection to this testimony, thereby preserving defendant's right of appeal. 55 App. Div. 2d at 400, 390 N.Y.S.2d at 937.

⁸⁰ The appellate division remanded the case for a new trial on other grounds. Presiding Justice Gulotta authored the majority opinion with which Justices Hawkins and Hopkins concurred. Dissenting to that portion of the majority's ruling which held the plaintiff incompetent to testify, Justice Shapiro apparently viewed CPLR 4519 as implicitly limiting its exception to a waiver by the protected party, and thus thought the majority opinion to be "judicial legislation." *Id.* at 404-05, 390 N.Y.S.2d at 940 (Shapiro, Latham, J.J., concurring and dissenting). Inasmuch as the statutory language does not mandate this conclusion, it is submitted that the dissent's position is not cogent. See notes 81-92 and accompanying text *infra*.

⁸¹ 55 App. Div. 2d at 402-03, 390 N.Y.S.2d at 938-39, quoting C. McCORMICK, LAW OF EVIDENCE § 65 at 142 (2d ed. E. Cleary 1972).

⁸² The court was of the opinion that, while it was unfortunate that the deceased could not proffer his account of the transaction by live testimony before the jury, this fact was not sufficient "to require the exclusion of [the survivor's] testimony *in toto*." 55 App. Div. 2d at 402-03, 390 N.Y.S.2d at 938-39. Indeed, the decedent's representative is afforded other devices with which to rebut the survivor's testimony, including an opportunity for cross-examination, the benefit of a summation, and a jury charge in which the jury is alerted to the decedent's absence. See *id.*

⁸³ *Id.* at 404, 390 N.Y.S.2d at 939. Justice Gulotta further added that "[a]bsent specific statutory proscription, it should be the court, and not the advocate, which . . . [decides whether to allow testimony], and in view of the protective ambience surrounding an exami-

The *Ward* holding marks a departure from the existing New York authority. In *Miller v. Adkins*,⁸⁴ decided in 1876, the Supreme Court, Third Department, held that the exception to the Dead Man's Statute was intended to apply only in the case of waiver by the party protected under the statute.⁸⁵ Although the Court of Appeals has never confronted the issue squarely, in dicta contained in an 1881 case, it has indicated that an interested party may not render himself competent to testify by entering into evidence a decedent's testimony.⁸⁶ Nevertheless, it is submitted that the decision in *Ward* is proper. As was suggested by the *Ward* court, the initial sense of urgency which led to the enactment of the Dead Man's

nation before trial, it is my opinion that the 'balance' is heavily weighted in favor of . . . the admissibility of 'survivor' testimony." *Id.* at 404, 390 N.Y.S.2d at 939-40.

In further support of its decision the court noted that commentators generally criticize the Dead Man's Statute. *Id.* at 401-03, 390 N.Y.S.2d at 938-39. One of the statute's critics, Professor McCormick, found fault with its logic. While the statute prevents a surviving party from perjuring himself by keeping him off the witness stand, Professor McCormick argued, a surviving party who is willing to lie for his own cause would hardly hesitate to engage an unscrupulous third person to fabricate a story for him. C. MCCORMICK, LAW OF EVIDENCE § 65, at 142-43 (2d ed. E. Cleary 1972). The honest survivor, on the other hand, finds that his truthful testimony is barred by the statute. *See id.*, at 143. Professor Wigmore, concurring in this view, stated that since the rule was "based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents." 2 J. WIGMORE, EVIDENCE § 578, at 697 (3d ed. 1940). Both commentators strongly urged that effective cross-examination of the survivor adequately protects a decedent's interest and prevents any injustice. *See id.*, at 696-97; McCormick, *supra* § 65, at 143. Moreover, "where [cross-examination fails,] . . . the scrutiny to which the testimony of a witness is subjected by the Court and by the jury, [is] efficacious in discovering the truth, to say nothing of the power of circumstantial evidence to discredit the mere oral statement of an interested witness." H. TAFT, LAW REFORM 79 (1926), quoted in 2 WIGMORE, *supra* § 578, at 697.

⁸⁴ 9 Hun 9 (N.Y. Sup. Ct. Gen. T. 3d Dep't 1876).

⁸⁵ *Id.* at 12. In *Miller*, the decedent, the original plaintiff in the action, had stipulated to the admission of certain of his statements into evidence. At trial, defendant attempted to render himself competent by introducing the deceased's stipulated testimony. The trial court construed the exception in § 399 of the Field Code, Code of Proc. § 399, ch. 983, [1849] N.Y. Laws 692 (repealed 1876), CPLR 4519's distant precursor, to be limited in application only to circumstances where the party benefiting from the statute introduces into evidence the deceased's testimony. In affirming this decision, the *Miller* court succinctly stated that the exception applies when the decedent's testimony is "[g]iven in evidence by whom? By the . . . [protected] party. Such is the statute's obvious meaning." *Id.*

⁸⁶ *See Potts v. Mayer*, 86 N.Y. 302 (1881). Although the Court of Appeals in *Potts* allowed a nonprotected party to trigger the exception to the Dead Man's Statute by introducing prior testimony of the decedent, *see id.* at 304-06, and thus rejected a strict waiver theory, in dicta the Court answered the exact question before the *Ward* court:

The question is not, as the respondent states it, whether a party can put in evidence the adverse statements of a deceased party, and so open the door to his own version of the same transaction. If that was, in truth, the question, we should be very likely to feel the force of the respondent's argument in favor of excluding the proposed [evidence].

Id. at 306.

Statute has been eroded by time and experience.⁸⁷ This is reflected in recent judicial decisions which have refused to extend the statute beyond its express language.⁸⁸ In *Ward*, therefore, the court's literal reading of the statute is compelling. Indeed, it has been recognized that while "[t]he obvious intention of [the Dead Man's Statute] is to preserve equality, and prevent unfair advantage,"⁸⁹ its purpose is often achieved "at the expense of the honest . . . whose mouths are stopped from proving valid claims."⁹⁰ For this reason, it is important that the statute not be construed expansively to protect interests that arguably do not require protection, namely, the interests of one who has given his version of the events by deposition.⁹¹ It thus seems that the purpose of the statutory exception, as well as the interests of both parties, will best be served by allowing an interested party to testify whenever a decedent has given testimony in court via deposition.⁹²

⁸⁷ See note 83 *supra*; note 88 *infra*.

⁸⁸ In *Phillips v. Joseph Kantor & Co.*, 31 N.Y.2d 307, 291 N.E.2d 129, 338 N.Y.S.2d 882 (1972), the Court of Appeals recently demonstrated that while it will apply the Dead Man's Statute, it will do so by adhering to the literal language of the statute. In that case, defendant moved for summary judgment, asserting that without the benefit of evidence excludable under 4519, plaintiff had failed to establish a triable issue of fact. The Court of Appeals reversed two lower court decisions in favor of the motion and held that the strict terms of the statutory language require that CPLR 4519 apply only at the "trial of an action or the hearing upon the merits of a special proceeding." *Id.* at 313, 291 N.E.2d at 132, 338 N.Y.S.2d at 886. Notwithstanding the logic of the dissent, which noted that "[i]f . . . 'the only evidence which can be used to oppose the motion is incompetent and if it is clear that no other evidence can be adduced at trial, there is no point in putting off a decision [in favor of the motion] . . .,'" *id.* at 316, 291 N.E.2d at 133, 338 N.Y.S.2d at 889 (Fuld, C.J., dissenting), quoting 5 WK&M ¶ 4519.06, the Court of Appeals' decision in *Phillips* is in line with its earlier practice of construing the Dead Man's Statute literally. See *In re Van Volkenburgh*, 254 N.Y. 139, 172 N.E. 269 (1930); *Lalor v. Duff*, 28 App. Div. 2d 66, 281 N.Y.S.2d 614 (3d Dep't 1967); *In re Nicol's Trust*, 3 Misc. 2d 898, 148 N.Y.S.2d 854 (Sup. Ct. N.Y. County 1956); *In re Estate of Kelly*, 45 Misc. 2d 107, 255 N.Y.S.2d 773 (Sur. Ct. Onondaga County 1964). See also *In re Estate of Isaacs*, 86 Misc. 2d 954, 383 N.Y.S.2d 976 (Sur. Ct. N.Y. County 1976), wherein the court stated: "This Dead Man's Statute is surely in need of revision by the Legislature. . . . The fear that interested parties may deviate from the truth should generally be viewed as affecting the weight, rather than the admissibility, of evidence." *Id.* at 957, 383 N.Y.S.2d at 979.

⁸⁹ *Potts v. Mayer*, 86 N.Y. 302, 305 (1881); see *Cole v. Sweet*, 187 N.Y. 488, 491, 80 N.E. 355, 357 (1907) (statute designed to ensure that "survivor . . . not take advantage of a deceased person and the personal representative . . . not take advantage of a survivor."

⁹⁰ SECOND REP. 268.

⁹¹ The procedures for taking a pretrial deposition are designed to achieve maximum fairness and probative value. See CPLR 3106-3117. To this end, deposing witnesses are under oath, CPLR 3113(b), and their testimony is fully recorded. *Id.* In addition, if a deponent is called upon by an adverse party to render testimony in a deposition, he is permitted to be cross-examined by his own attorney, who is not restricted from raising matters beyond those initially raised in the adverse party's inquiry. CPLR 3113(c).

⁹² The positions taken by the few jurisdictions in which the applicable statute raises the

In practical effect, the *Ward* holding highlights the significance of preserving a party's testimony. Under *Ward*, a practitioner who has secured the testimony of his opposing party by deposition will have protected his own client's right to testify, notwithstanding the death of the opposing party. Conversely, by preserving his own client's testimony in a deposition, the practitioner may be "opening the door" for his opponent to testify in the future. In any event, by permitting the party with the most knowledge to testify before the court, the import of *Ward* should be to further the search for truth in those cases in which a decedent's testimony has been preserved.

ARTICLE 52—ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5232(a): Service of execution terminates statutory right of setoff.

CPLR 5232(a) provides judgment creditors with a means for levying upon a debt owed a judgment debtor by a third party.⁹³ Once a copy of an execution is served upon the third party-garnishee, he must pay any mature debt owed the judgment debtor to the sheriff; the garnishee is prohibited from paying or otherwise disposing of the debt to any other person.⁹⁴ When the garnishee is also a creditor of the judgment debtor the situation becomes more complex. Under section 151 of the Debtor and Creditor Law, the garnishee may set off his indebtedness against debts owed him by the judgment debtor.⁹⁵ Thus, section 151 purports to allow the third party-

same problem posed in *Ward* lend support to the *Ward* holding. See, e.g., *Coble v. McClintock*, 10 Ind. App. 562, 38 N.E. 74 (1894); *Coughlin v. Hauessler*, 50 Mo. 126 (1872); *Goehring v. Dillard*, 145 Ohio St. 41, 60 N.E.2d 704 (1945). But see *Levy v. Dwight*, 12 Colo. 101, 20 P. 12 (1888). See also 3 B. JONES, *LAW OF EVIDENCE* § 20:43, at 692 (6th ed. 1972).

⁹³ CPLR 5232(a) provides for a levy upon debts owed a judgment debtor by serving a third party-garnishee with an execution. CPLR 105(i) defines garnishee as "a person who owes a debt to a judgment debtor, or a person other than the judgment debtor who has property in his possession or custody in which a judgment debtor has an interest." See generally 6 WK&M ¶ 5232.08.

⁹⁴ CPLR 5232(a) provides in pertinent part:

The person served with the execution shall forthwith transfer all such property, and pay all such debts upon maturity, to the sheriff and execute any document necessary to effect the transfer or payment. . . . [T]he garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff

⁹⁵ N.Y. DEBT. & CRED. LAW § 151 (McKinney Supp. 1977) provides in pertinent part: Every debtor shall have the right upon . . . the issuance of any execution against any of the property of . . . a creditor, to set off and apply against any indebtedness, whether matured or unmatured, of such creditor to such debtor, any amount owing from such debtor to such creditor, at or at any time after, the happening of